No. 01-1003

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
RICHARD McALLAN,

Petitioner,

v.

THE CITY OF NEW YORK, a Municipal Corporation, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, a Public Benefit Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly determine that petitioner's appeal was not timely and the court therefore lacked jurisdiction over the appeal, where: (a) petitioner filed a notice of appeal while a motion for reargument was pending in the district court; (b) Second Circuit staff counsel advised the parties that the appeal appeared to be ineffective because of the pendency of the motion to reargue; (c) petitioner stipulated to withdraw his appeal without prejudice to reinstating it upon written notice within 30 days of disposition of the reargument motion; (d) unbeknownst to the parties and staff counsel, the reargument motion was decided prior to the stipulation withdrawing the appeal; (e) the district court clerk did not mail copies of the order denying reargument to the parties or transmit the order to the clerk of the court of appeals; (f) such order allegedly did not comply with the "separate document" requirement of Fed. R. Civ. P. 58; (g) after learning of the order nearly two months later, petitioner submitted a letter to the district court requesting that the order be re-issued so that petitioner could file an amended notice of appeal within 30 days thereof; (h) the district court acceded to that request; and (i) 29 days later, which was beyond the time periods authorized by Fed. R. App. P. 4(a), petitioner submitted an amended notice of appeal to the court of appeals?

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I

STATEMENT OF THE CASE

The Applicable Law

Rule 4 of the Federal Rules of Appellate Procedure establishes time requirements for filing a notice of appeal, which are "mandatory and jurisdictional." *See Browder v. Dir., Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). Courts are forbidden to "enlarge" the time limits prescribed in Rule 4 for filing a notice of appeal. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Rule 4(a)(1) requires a notice of appeal to be filed "within 30 days after the judgment or order appealed from is entered" (60 days if the United States or its officer or agency is a party). Rule 4(a)(4), however, provides that if a party timely files any of certain specified motions, including a motion to alter or amend the judgment under Fed. R. Civ. P. 59, the time to file an appeal runs from the entry of the order disposing of the last such motion.

An extension of time to file a notice of appeal is allowed under Fed. R. App. P. 4(a)(5) only if requested within 30 days following the time prescribed by Rule 4(a) and the party so moving shows excusable neglect or good cause. Inadvertence, ignorance of the rules, or mistakes in construing the rules do not usually constitute excusable neglect. *See Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 392 (1993). Even where the motion is timely filed and excusable neglect is found, Rule 4(a)(5)(C) limits extensions of time to file a notice of appeal to 30 days beyond the prescribed time under Rule 4(a), or 10 days after the date when the order granting the extension of time is entered, whichever is later. Where, however, a court finds that "unique circumstances" exist, it may allow an

appeal to be heard on the merits despite its tardiness, but only if the party has "performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). *See also Thompson v. INS*, 375 U.S. 384 (1964).

Rule 4(a)(6) allows a district court to reopen the time to file an appeal for a period of 14 days following the date the order to reopen is entered, provided however: (i) the motion to reopen is filed within 180 days from the entry of the judgment or order appealed from, or within seven days of receiving notice of the judgment entry, whichever is earlier; (ii) the moving party was entitled to, but did not, receive notice of the judgment within 21 days of entry; and (iii) no party would be prejudiced.

The Prior Proceedings

This is petitioner's second lawsuit challenging the legality of the 1996 transfer of operating functions of the Emergency Medical Service ("EMS") from respondent New York City Health and Hospitals Corporation to respondent New York City Fire Department, and billing arrangements ancillary to that transfer. When the petitioner's state court challenge was rejected on the merits, he commenced the present *qui tam* action, alleging that after the transfer of EMS functions, neither respondent was authorized to provide, or bill for, emergency ambulance services, and that therefore every Medicare and Medicaid payment claim submitted by respondents for such services violated the False Claims Act, 31 U.S.C. §§ 3729, *et seq.* The Federal Government declined to intervene as a plaintiff in the action. (Pet. App. 12a.)

On May 4, 1999, the district court (Knapp, J.) granted respondents' motion to dismiss the complaint, ruling that the alleged violations of the False Claims Act had been previously publicly disclosed in petitioner's prior state court action and elsewhere, the petitioner was not an "original source" of the information, and the court therefore lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A). Judgment was entered on May 13, 1999. On May 27, 1999, petitioner filed a motion for reargument and for leave to file an amended complaint. On June 10, 1999, petitioner filed a notice of appeal under Fed. R. App. P. 3(a)(1). By order entered on July 13, 1999, the district court denied petitioner's motion. The docket sheet indicates that copies of the ruling were mailed to the parties, but they apparently were not received by any party. Nor was a copy forwarded to the court of appeals pursuant to Fed. R. App. P. 3(d). On July 20, 1999, the parties, unaware of the July 13 decision, stipulated to a withdrawal of the appeal without prejudice to its being renewed upon written notice within 30 days of entry of an order disposing of the post-judgment motion, pursuant to Fed. R. App. P. 4(a)(4). The stipulation was "So Ordered" on August 4, 1999.[1]

1. The "Stipulation Withdrawing Appeal Without Prejudice Pursuant to F.R.A.P. 4(a)(4)" states:

> Whereas the notice of appeal filed herein is rendered "ineffective" under F.R.A.P. 4(a)(4) by the timely filing of a post-judgment motion; and
>
> Whereas appellant intends to reactivate this appeal once the District Court disposes of the aforesaid motion; WHEREFORE
>
> IT IS STIPULATED AND AGREED by the parties through their undersigned counsel that the above appeal

(Cont'd)

According to petitioner's post-argument letter brief submitted to the court of appeals, petitioner's counsel sought to ascertain the status of his May 27 reargument motion on September 9, 1999, by sending an associate to the district court clerk's office, thereupon learning that the motion had been decided on July 13 (*see* Pet. App. 4a). By letter to the district court judge dated September 12, 1999 (a Sunday) but stamped "Received" on September 14, 1999 — 63 days after entry of the order denying reargument — petitioner's counsel informed the judge of his belated awareness of the ruling on the motion, and requested that the decision be re-issued in order to allow reinstatement of the appeal within 30 days. By order dated September 15 and entered on September 23, 1999, the district court judge acceded to the request, noting that "plaintiff's counsel now applies, in a letter dated September 12, to re-issue our Order denying the motion to reargue so that appeal can be re-instated within thirty days thereafter, in accordance with the Stipulation. Since we credit counsel's account concerning the non-delivery of the July 13 Order, we hereby re-instate such Order as of today's date." (Pet. App. 4a.) Petitioner states (Pet. 4) that on October 14, he hand delivered an amended notice of appeal to the Second Circuit. The court of appeals noted (Pet. App. 4a) that the docket sheet states that petitioner's appeal was "re-instated" on October 26, 1999.

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> is hereby withdrawn, without costs and without attorney's fees, and without prejudice to being reactivated upon written notice to the Clerk by either party within 30 days of entry on the District Court docket of the order disposing of the timely file post-judgment motion.

The Court of Appeals Decision

By decision dated April 19, 2001, following submission of post-argument letter briefs, the court of appeals determined that it lacked jurisdiction over the appeal as untimely, and dismissed the appeal. The court construed petitioner's district court motion for reargument as a Rule 59(e) motion, which, if timely filed, would extend the deadline for appeal, but determined that his amended notice of appeal was not filed within the required 30 days after the district court's order denying the motion — *i.e.*, by August 12, 1999. The court noted that the requirement of Fed. R. App. P. 4(a)(1), that a notice of appeal be filed "within 30 days after the judgment or order appealed from is entered," is "mandatory and jurisdictional" (Pet. App. 5a), and that "even allowing for the sole thirty-day extension of time permitted by Fed. R. App. P. 4(a)(5), any appeal of [the] ruling denying the [reargument motion] was due no later than September 13, 1999" (Pet. App. 6a). As petitioner's notice of appeal was submitted to the court of appeals on October 14 and filed on October 26, 1999, it was "plainly untimely, depriving this Court of jurisdiction absent 'unique circumstances.' " (Pet. App. 6a, quoting *Thompson, supra*, 375 U.S. at 387.)

The court of appeals noted (Pet. App. 8a) that the "unique circumstances" doctrine applies only to situations "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done," *Osterneck, supra*, 489 U.S. at 179, and found no such circumstances existed to excuse petitioner's untimely appeal. The court concluded that the district court gave no assurances that petitioner's strategy would toll the appellate

deadlines, and that that court "merely acceded to [petitioner's] request without independent consideration of its efficacy." (Pet. App. 8a.) The court also found that there was no indication that the district court clerk had failed to docket the order denying reargument correctly, or timely enter it into the computerized docketing system, and that the "so ordered" entry on the parties' stipulation did not constitute a specific judicial assurance that the stipulation could achieve its stated objective. Finally, the court noted that while Fed. R. App. P. 3(d)(1) requires district clerks to send subsequent docket entries, including the order denying reconsideration, to the clerk of the court of appeals, "this Rule does not impose an obligation on the clerk's office to monitor the docket sheet and highlight for the parties the wisdom, or lack thereof, of a particular filing." (Pet. App. 9a.)

The court found that Rule 4(a)(6) "precisely addresses," and provides a remedy for, parties finding themselves in petitioner's situation, but that he did not proceed under the time frame provided by that Rule. (Pet. App. 7a.) Construing petitioner's letter to the district court as a motion under Rule 4(a)(6) to "reopen" the time to file an appeal for a period of 14 days, the court found that to be timely, petitioner's notice of appeal would have to have been filed within 14 days of the district court order (of September 23, 1999) "reissuing" the previous order. Instead, as noted above, petitioner delivered an amended notice of appeal to the court of appeals on October 14, 1999, which was docketed in the district court on October 26, 1999. (Pet. 4; Pet. App. 4a.)

On June 1, 2001 — forty-three days after the April 19, 2001, decision holding that that petitioner's appeal was untimely — petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. That petition was denied on August 7, 2001.

REASONS FOR DENYING THE WRIT

Petitioner's problems are of his own making. First, he failed to file a notice of appeal within the time requirements of Fed. R. App. P. 4(a) after voluntarily withdrawing his first appeal. Second, notwithstanding the explicit (and sole) remedy provided by Fed. R. App. P. 4(a)(6) for litigants who fail to receive notice of an order or judgment, he ignored the requirements of that Rule, and instead sought to design his own unauthorized remedy. Thus, the issues presented may be important to litigants who disregard appellate jurisdictional requirements, but they do not otherwise have "great practical importance" or "significant national implications for all Federal appellants," as petitioner asserts (Pet. 10, 6).

The court of appeals correctly applied Fed. R. App. P. 4(a) in determining that it lacked jurisdiction of petitioner's appeal, and there is no compelling reason for further review. There was no error of law that calls for an exercise of this Court's supervisory power, and the decision does not directly conflict with any decision of this Court or create a conflict among the courts of appeals. Moreover, certain of the questions presented were not properly raised below and were not addressed by the court of appeals.

1. The petition should not be granted to address the question whether petitioner's letter delivered to Judge Knapp on September 14, 1999 should be deemed the "functional equivalent" of a notice of appeal under *Smith v. Barry*, 502 U.S. 244 (1992) (*see* Pet. 15-16, Question Presented 3). In *Smith*, the Court examined whether a *pro se* appellant's brief could constitute a notice of appeal when filed within the time prescribed by Fed. R. App. P. 4. The Court reasoned that Fed. R. App. P. "3(c) governs the content of notices of appeal," and that its requirements are to be "liberally construe[d]." *Id.* at 247-48.

First, certiorari on this ground is not appropriate, as petitioner did not properly raise this "functional equivalent" argument in the court of appeals — he raised it for the first time in his petition for rehearing and suggestion for rehearing *en banc*[2] — and the court of appeals did not address the issue. *See N.C.A.A. v. Smith*, 525 U.S. 459, 470 (1999) (Court does not decide in the first instance issues not decided below); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to address issues not sufficiently developed below); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (Court does not decide questions not raised or resolved below).

Second, the decision below is not "in direct conflict" with *Smith*, as petitioner asserts (Pet. 12). The "liberal interpretation" principle announced in *Smith* applies only to determinations whether a filing can be deemed the "functional equivalent" of a notice of appeal under Rule 3(c), and does not excuse noncompliance with the timeliness

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2. *See Anderson v. Branen*, 27 F.3d 29 (2d Cir. 1994) (argument raised for the first time on petition for rehearing is deemed abandoned).

requirements under Rule 4. *See* 502 U.S. at 248. Indeed, the Court noted that the Federal Rules may allow a filing styled a brief to be considered a notice of appeal "*if* the filing is *timely* under Rule 4". *Id.* at 249 (emphasis added).[3] The filing in *Smith* was timely: the Court found that appellant "returned his informal brief to the Court of Appeals . . . *within the deadline for filing a notice of appeal.*" 502 U.S. at 246-47 (emphasis added).

Here, petitioner's letter was not timely: it was submitted to Judge Knapp on September 14, well beyond the 30-day deadline for appealing under Rule 4(a) from the July 13 order denying reargument. Thus, even assuming *arguendo* that the letter satisfies the content requirements of Rule 3(c), it was filed too late.

2. Contrary to petitioner's assertions, the decision is not inconsistent with the 1993 amendments to Fed. R. App. P. 4(a)(4)(B), which provide that a notice of appeal filed after the court announces a judgment, but before it disposes of a motion listed in Rule 4(a)(4)(A), becomes effective to appeal a judgment or order when the order disposing of the last such motion is entered. The 1993 amendments do not preclude a party from stipulating to withdraw an appeal, as petitioner did here, which renders the original appeal a nullity. *See Barrow v. Falck*, 977 F.2d 1100, 1103 (7th Cir. 1992).

Nor does the decision conflict with decisions of the Fifth and Ninth Circuits[4] on the question of the effect, under

3. Nor is the decision in conflict with *Foman v. Davis*, 371 U.S. 178 (1962), as petitioner asserts (Pet. 9-10). That case involved a question of the proper *interpretation* to be given a notice of appeal, not its timeliness.

4. *See* Pet. 13-14, citing *Leader Nat'l Ins. Co. v. Industrial Indemnity Ins. Co.*, 19 F.3d 444 (9th Cir. 1994) and *United States v.* (Cont'd)

Rule 4(a)(4)(B), of such a premature notice of appeal. (*See* Pet. 10-14, Questions Presented 1, 4.) Neither of the cases cited involved an appellant who, after *withdrawing* his appeal, failed to timely reinstate it by filing a new notice of appeal following disposition of the motion. Indeed, the result here is consistent with decisions holding that an appeal, once voluntarily dismissed, even under a misapprehension of law, may not be reopened after the time for appeal has passed. *See Futernick v. Sumpter Township*, 207 F.3d 305, 311-12 (6th Cir. 2000); *Barrow*, *supra*, 977 F.2d at 1103.

3. The petition should not be granted to address the question whether the district court order denying reargument complies with the "separate document" requirement of Fed. R. Civ. P. 58 (*see* Pet. 14, Question Presented 2). First, petitioner raised this argument for the first time in his petition for rehearing submitted to the court of appeals (*see supra* p. 8), and that court did not address it. Second, this Court has denied certiorari in another case that, unlike here, squarely addressed the issue. *See Puerto Rico Aqueduct & Sewer Auth. v. Constructora Lluch, Inc.*, 169 F.3d 68 (1st Cir.), *cert. denied*, 528 U.S. 872 (1999). In any event, certiorari is unnecessary, as the Judicial Conference has approved and transmitted to the Supreme Court certain proposed amendments to such Federal Rules,[5] which resolve

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One Hundred Twenty-four Thousand Eight Hundred and Thirteen Dollars ($124,813) in U.S. Currency, 53 F.3d 108 (5th Cir. 1995), *cert. denied, Sivaskandan v. United States*, 516 U.S. 1171 (1996).

5. *See* Excerpt From The Report Of The Judicial Conference Committee On Rules Of Practice And Procedure, Amendments To The Federal Rules Of Civil Procedure, Civil Rule 58, Aug. 2000 – Dec. 2000 Class (Submitted to the United States Supreme Court Nov.
(Cont'd)

any uncertainties about how to reconcile the definition in Rule 4(a)(7) of when a judgment or order is "entered" with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document.

4. Nor should certiorari be granted to determine whether the court of appeals should have excused the untimely filing of petitioner's notice of appeal on the ground that the district court did not forward a copy of the denial of his reargument motion to the Second Circuit or the parties (petitioner's Question Presented 5). Even though Fed. R. Civ. P. 77(d) required the district court to mail a copy of the order denying reargument to the parties, it also expressly provides that "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." As noted above (pp. 2, 6), Fed. R. App. P. 4(a)(6) provides a specific remedy for litigants who do not receive notice of entry of a judgment or order. Petitioner simply ignored that Rule, and failed to comply with its filing requirements.

(Cont'd)
2001), http://www.uscourts.gov/rules/supct1101/CVExcerptSC.pdf; Proposed Amendments To The Federal Rules Of Civil Procedure, http://www.uscourts.gov/rules/supct1101/CVRulesJC.pdf; Excerpt From The Report Of The Judicial Conference Committee On Rules Of Practice And Procedure, Amendments To The Federal Rules Of Appellate Procedure, Appellate Rule 4, Aug. 2000 – Dec. 2000 Class (Submitted to the United States Supreme Court Nov. 2001), http://www.uscourts.gov/rules/supct1101/APExcerptSC.pdf; Proposed Amendments To The Federal Rules Of Appellate Procedure, http://www.uscourts.gov/rules/supct1101/APRulesJC.pdf. (All URLs last visited Feb. 5, 2002.)

5. Certiorari is not warranted because the court of appeals correctly determined that petitioner's appeal was untimely. Petitioner stipulated to withdraw his first appeal subject to reinstatement following disposition of the motion to reargue, but his amended notice of appeal was not filed, as required under the stipulation and Rule 4(a)(4)(B), by August 12 (30 days from July 13). It was delivered to the Second Circuit on October 14.

Rule 4(a)(5)(A) allows the district court to extend the time to file a notice of appeal if: "(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause." But even assuming *arguendo* that petitioner's letter stamped "Received" on September 14, 1999, constitutes a timely motion for an extension and that he could establish excusable neglect, thus satisfying Rule 4(a)(5)(A), he did not comply with Rule 4(a)(5)(C), which provides: "No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later." Here, "30 days after the prescribed time" would be September 13. Petitioner's October 14 amended notice of appeal was too late. Nor does the alternative "10 days after the date when the order granting the motion is entered" help him, as that date is October 7.

6. Petitioner nevertheless argues (*see* Pet. 26-28) that the district court order entered on September 23 purported to give him an additional 30 days to file a new notice of appeal, and that such order constitutes "unique circumstances" under *Thompson*, *supra*, 375 U.S. 384, that excuse the untimely filing of his notice. The *Thompson* petitioner had filed an untimely post-trial

motion, which the district court explicitly informed him was filed "in ample time." Upon denial of his motion, and in reliance on the court's assurances, he filed a notice of appeal within the allotted 60 days of the entry of judgment on his motion. Citing these "unique circumstances," this Court allowed the appeal to be heard on the merits, notwithstanding the tardy notice of appeal.

Thompson does not help petitioner, because *Thompson's* "unique circumstances" are inapplicable in the absence of express assurances by the district court — not present here — that a motion has been timely filed. Where a party has simply erroneously interpreted (or, as in this case, ignored) the rules with regard to the time for appeal, the circumstances do not warrant an extension beyond the time limits provided by the Rules. "By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck, supra*, 489 U.S. at 179.

Here, petitioner received no "specific assurance" from the court that such act was properly done. He simply neglected to file his appeal within the specified Rule 4(a) deadlines, and ignored the remedy available under Rule 4(a)(6) for litigants who, like petitioner, failed to receive notice of a judgment or order sought to be appealed from. Instead, he asked the district court judge for different relief that petitioner erroneously believed would be effective to enlarge his time to appeal. To the extent he believed that the court could authorize, on September 23, an additional 30-day extension to file, he was mistaken. The district court gave no specific assurance that petitioner's prior acts were proper or would produce the desired effect; it simply granted

him what he requested, based on his own ignorance or erroneous interpretation of Rule 4(a)(6).

Nor does the Second Circuit Notice of Preargument Conference and Order constitute a "unique circumstance" permitting an untimely appeal. That Notice stated: "It appears that the appeal is 'ineffective' under FRAP 4(a)(4), because of timely-filed post-judgment motion"; such a comment as to what "appeared" to be the status of petitioner's reargument motion in another court can hardly be said to constitute binding notice as to the status of that motion, and cannot excuse parties from their obligation to check the docket sheet (*see supra* p. 11).

In any event, petitioner's question (whether "unique circumstances" exist that should excuse his late filings) presents an issue of an alleged misapplication of a properly stated rule of law. Supreme Court Rule 10 provides that such misapplications of law are rarely a basis for certiorari.

7. Finally, the court of appeals correctly determined that petitioner's untimely appeal was not authorized by Rule 4(a)(6), which, under certain circumstances (*see supra* p. 2), allows a district court to reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered. As noted above, Rule 4(a)(6) provides a specific remedy for parties who failed to obtain notice of a judgment or order sought to be appealed from, but, as the court of appeals noted, even construing petitioner's September 14 letter to be a Rule 4(a)(6) motion, petitioner failed to proceed under the time frame provided by that Rule. Thus, even assuming *arguendo* that the conditions for reopening were satisfied here, petitioner's October 14, 1999 notice of appeal was not filed within the 14 days allowed by the Rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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